No. 687

Nos. 13,599-13,600

BRIEF OF APPELLANT AND JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
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October Term, 1956.

No. 13,599

MURPHY AUTO PARTS CO., INC.,
Appellant,

v.

THOMAS CHARLES BALL,
Through his next friend
RITA H. BALL,
Appellees,

No. 13,600

MURPHY AUTO PARTS CO., INC.,
Appellants,

v.

GEORGE J. BALL, SR., and
RITA H. BALL,
Appellees.

Appeal from the United States District Court for the District of Columbia

R. SIDNEY JOHNSON
GUY B. HARDY
Attorneys for Appellant,
Union Trust Building,
Washington 5, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

STATEMENT OF QUESTIONS PRESENTED

The question is whether the declaration of a motorist whose car had struck a pedestrian, made at the scene shortly after the accident, to the effect that he was engaged in the performance of some business for his employer at the time and place of the collision, was admissible in an action against the employer as proof of the liability of the employer under the doctrine of respondeat superior, and whether the trial Court erred in submitting the case to the jury upon the question of agency, upon all of the evidence.

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the District Court, based on a jury verdict in favor of the appellees in an action for damages for personal injuries. This

Court has jurisdiction by virtue of Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

On the evening of October 20, 1952, James B. Murphy, an employee of the appellant, Murphy Auto Parts Co., a corporation, while off duty and driving his own private automobile from his place of employment in the appellant's store in Takoma Park, D. C., on his way to his home in Southeast Washington, struck and injured the appellee, Thomas Charles Ball, a minor, who ran in front of his car on Minnesota Avenue, near B. Street, Southeast. About a month thereafter, Civil Action No. 5224-52 was instituted in the Court below by said minor, through his mother and next friend, Rita H. Ball, against James B. Murphy, claiming damages for negligent injury of the boy. Some sixteen months later, the same plaintiffs filed Civil Action No. 943-55 against the appellant, alleging that at the time of the accident, James B. Murphy was operating his automobile on business of the appellant, and invoking the doctrine of respondeat superior. Thereafter, in September, 1955, the boy's parents, George J. Ball, Sr. and Rita H. Ball, filed Civil Action No. 4168-55 against both James B. Murphy and the appellant, for the recovery of damages sustained by them consequent upon the injuries to their son. These three actions were consolidated (R. 328, 333; J. App. 7, 12), and tried to a jury in June, 1956. The jury returned verdicts in favor of all plaintiffs against both defendants (R. 336, 337; J. App. 14, 15, 16).

Examination of the facts of the accident is not necessary, because the questions raised on this appeal concern only the liability of the appellant, Murphy Auto Parts Co., Inc., under the evidence.

The evidence at the trial was undisputed that James B. Murphy, at the time of the accident, was employed as a

counterman in the store of the appellant (R. 4, 72; J. App. 32, 33, 61, 62); that his duties were confined to receiving orders from customers in the store, or over the telephone (R. 5, 7-9; J. App. 33, 35, 36, 53), and delivering the merchandise sold to the customer in the store, or handing it to delivery men employed by the company, who made the deliveries in trucks owned and operated by it for that purpose (R. 12, 36, 71-74, 76; J. App. 38, 52, 62, 63). He had no authority to call on customers or make deliveries outside the store, and did not do so (R. 5, 9, 37, 75; J. App. 33, 36, 53, 54, 63). He received a salary of fifty dollars a week, and in addition thereto a sum of ten dollars a week (R. 7; J. App. 34), which was carried on the books of the corporation as a "car allowance" (R. 13-15; J. App. 38-40). His regular hours of employment by the appellant were from 8:00 o'clock A. M. to 5:00 o'clock P. M. daily (R. 8, 9; J. App. 35).

It was testified that James B. Murphy began working for the appellant while he was attending the University of Maryland (R. 4; J. App. 33), and acted as a part time counterman in the appellant's store, using his own automobile in traveling from the University to the store. Milburn L. Murphy, president of the corporation, is his foster father (R. 68; J. App. 59). His mother, Florence Murphy, was also employed by the appellant (R. 4; J. App. 33). James was paid the ten dollar weekly allowance, in addition to a small weekly salary to help him get through school (R. 12, 76-79; J. App. 38, 39, 64). After he completed his schooling at the University, he commenced working full time for the company, and the car allowance was continued (R. 12-14, 20, 40-44; J. App. 38, 39, 43, 54-59), and was still in effect on the day of the accident here involved. The allowance was considered to be merely an adjunct to his salary (R. 77-79; J. App. 64, 65), and he testified that he used the money to defray his expenses in driving his car from his home to work and back (R. 44; J. App. 57).

There was no evidence that James used his car on company business, or for calling on customers of the appellant, or for making deliveries. All of the evidence was that he did not so use his car (R. 83, 84; J. App. 68, 69). There was no evidence that at the time of the accident he held any other position with the appellant, or had any occasion to use his car in the company's business.

The transactions with customers on the day of the accident, October 20, 1952, were reflected by the sales slips made out by the countermen in the store, which were introduced by the appellees' counsel (R. 23; J. App. 45-52). A number of these slips showed sales made by James Murphy in the store that day while he was on duty, but none of them bore evidence of any deliveries made by him out of the store, or any necessity therefor. There was no sale shown to have been made to any customer in Southeast Washington (R. 23-37; J. App. 45-52).

The uncontroverted evidence showed that at 5:00 o'clock on the evening of the accident (R. 62; J. App. 58), James Murphy, having completed his day's work for the appellant, entered his private automobile (R. 21; J. App. 44), which was parked at the rear of the store (R. 62; J. App. 58), and when the accident occurred, at about 6:15 o'clock P. M., had traveled a distance of some ten miles (R. 20, 40; J. App. 44, 54) toward his home (R. 44, 45; J. App. 57, 58), a trip across the city that usually consumed over an hour at that time of day. He had no business to transact for the appellant after leaving the store (R. 45, 62, 63; J. App. 57, 58), and was not due back on duty until 8:00 o'clock A. M. the succeeding day (R. 63; J. App. 58).

The only evidence offered by the appellees to prove that James B. Murphy was engaged in the performance of any business for the appellant when the accident happened was the uncorroborated testimony of Mrs. Rita H.

Ball, who said that she alighted from a bus near the scene of the accident shortly after her son had been injured, and was approached on the street by James B. Murphy (R. 102-104; J. App. 80, 81); that he "Told me that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home" (R. 105; J. App. 81).

Appellant's counsel promptly objected and moved the Court to strike this testimony on the ground that the quoted declaration of James Murphy was inadmissible, as against the appellant, to prove the scope of hi employment or that he was engaged upon appellant's business when the accident occurred (R. 105-112; J. App. 82-87). The objection was overruled, and the testimony of Mrs. Ball as above quoted was admitted into evidence (R. 112; J. App. 86-87). James B. Murphy denied making any such statement to Mrs. Ball (R. 66, 67; J. App. 58-59).

The court thereafter denied appellant's motions for a directed verdict at the close of the appellees' evidence, and at the conclusion of all of the evidence, and declined to instruct the jury in accordance with appellant's Prayer No. 2 (R. 335; J. App. 17), and over appellant's objection, (R. 195, 196; J. App. 116, 117), granted appellees' Prayer No. 19 (R. 334; J. App. 16), and instructed the jury that they could take into consideration the declarations of James B. Murphy made at the scene of the collision, if they believed that he made them, in determining whether he was acting within the scope of his employment at the time and place of the accident (R. 481; J. App. 108). The appellant moved for a new trial, or in the alternative for judgment non obstante veredicto (R. 338; J. App. 18, 19), which motion was denied by the Court (R. 340; J. App. 19).

STATEMENT OF POINTS

1. The Court erred in admitting into evidence testimony as to declarations or admissions of James B. Mur-

phy, made at the scene following the accident, as evidence that he was acting within the scope of his employment by the appellant when the collision occurred.

2. The Court erred in denying the motion of appellants to strike the aforesaid testimony.

3. The Court erred in overruling the appellant's motion for a directed verdict in its favor.

4. The Court erred in denying appellant's requested instruction No. 2.

5. The Court erred in granting appellees' requested instruction No. 19.

6. The Court erred in submitting the case to the jury under the evidence.

7. The Court erred in denying the appellant's motion to set aside the verdict and for judgment non obstante veredicto.

SUMMARY OF ARGUMENT

1. The evidence showed that James B. Murphy was not acting within the scope of his employment at the time and place of the accident involved.

2. The erroneous admission into evidence of the testimony as to declarations made by James B. Murphy relating to the scope of his employment was prejudicial error.

ARGUMENT

I.

The appellees had the burden of establishing by evidence that on the occasion in question James B. Murphy was operating his automobile upon some business for his employer, or within the scope of his employment. *Bendheim* v. *Pigford*, 31 App. D. C. 488. It is to be noted

that no presumption of agency arises from the facts in the case. That James Murphy was driving his own automobile at the time of the accident is undisputed.

In attempting to carry the burden of proof, the appellees called to the stand the defendant James B. Murphy, and Milburn L. Murphy, president of the appellant, Murphy Auto Parts Co., Inc., and elicited from them facts which proved the exact contrary of their contentions, to wit, that at the time of the collision James had concluded his day's work for the appellant, and was in the act of driving to his home in pursuance of purposes entirely his own, having no business of the appellant to perform on the way; that his employment by the appellant was that of a counterman in its store, and that his duties as such were to receive orders and make sales in the store; that he was not required, in the performance of those duties to travel from the store, to call on customers, or to make deliveries; that he was not authorized to perform such acts, and had not been known or permitted to do so at any time prior to the date of the accident.

Having called their adversaries as witnesses, and failed to contradict their testimony or proved it to be false, the appellees were concluded by the testimony so elicited. *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 86 F. Supp. 255, in which the Court said:

> "The general rule is that a party calling his adversary as a witness vouches, at least to some extent, for his credibility, and is concluded by his testimony so elicited if it is not contradicted or proved false, and this rule also applies to testimony so elicited from an officer, employee, or servant of the adverse party."

Certain interrogatories and answers, and a memorandum relating thereto, were offered by the appellees in an effort to show that contrary admissions had been made of record by the appellant, but that evidence was rejected

by the Court when it became apparent that the statements of the witness contained therein did not refer to the year 1952, or definitely to the day of the accident (R. 84-101; J. App. 68-80). Therefore, the appellees succeeded in proving only that James Murphy was not acting within the scope of his employment, but was engaged in his own personal pursuits when the collision occurred, and there the case against the appellant completely failed, for it is settled law in this jurisdiction, and indeed universally, that a principal is not liable for his agent's tort unless it is within the scope of the agent's employment, and it is not within the scope of the employment if it is done for the agent's purposes only.

M. J. Cline Co. v. *Cashdan*, 84 U. S. App. D. C. 58, 171 F.2d 132.
Park Transfer Co. v. *Lumbermens Mut. Cas. Co.*, 79 U.S.App.D.C. 48, 142 F.2d 100.
Lucas v. *Friedman*, 58 App. D. C. 5, 24 F.2d 271.

Appellees' counsel appeared to attach considerable importance to the fact that James Murphy received from his employer an allowance of ten dollars a week in addition to his regular salary, this allowance being described on the company's books of account as a "car allowance". It was made perfectly clear by the testimony of the two Murphys that this allowance was not made for any expense of James for operation of his car on company business, and all of the evidence was to the effect that he did not make such use of his car. The fact that the money so allowed was intended or used to defray the expenses of operating his automobile while off duty, driving to and from his home, or to and from the University of Maryland at the time he was attending classes there, or for other purely private purposes, was insufficient to establish any general agency of authority on behalf of the Murphy Auto Parts Co., Inc., which would render that company responsible for tortious or negligent acts committed by James Murphy while so using his car.

There was nothing in the evidence to show that James was held accountable in any way to the company for his use of the "car allowance", or that he was obligated to expend the money so paid him solely for the operation of his car. So far as the evidence shows he was perfectly free to mingle the amount with his other funds and to use it in any way he wished. It is clear that the allowance was intended only as additional compensation, or as an adjunct to James' regular salary, and under all of the evidence no other inference could reasonably be drawn. Whether or not the item was properly entered or carried on the company's books from an accounting or tax standpoint is not a question that is material or relevant to the substantive issue of agency. The appellant company exercised no control or supervision over the use of his car by James. He was apparently at liberty to drive it where he pleased while he was not on duty in the appellant's store.

> "The usual test in such circumstances, that is to say, the determination of liability for a negligent act on the part of a servant, is the right or the power on the part of the person charged, to command and control the servant in the performance of the causal act at the moment of performance." *Phelps* v. *Boone*, 62 App. D. C. 308, 67 F.2d 574.
>
> *Consolidated Home Equipment Co.* v. *Crossland*, 78 App. D. C. 54, 137 F.2d 675.

In *Postal Telegraph-Cable Co.* v. *Thomas*, 65 App. D.C. 351, 83 F.2d 608, this Court quoted with approval the following from the opinion in *Green* v. *Western Union Telegraph Co.* (Mo. App. 1933) 58 S.W.2d 772, 773:

> "If the act resulting in the injury is committed by the servant at a time when he is off duty, as for instance, after the day's work is completed, or at noon hour, or where the servant has been given a holiday, the master will not be liable therefor; and it has been held that this is so, although the act is one which, if done by the servant while on duty and at a time

when actually engaged in the master's service, would be within the course and scope of his usual and ordinary duties."

Where the uncontroverted proof showed that James Murphy was operating his private automobile while off duty and for purposes entirely his own, the question of the responsibility of the appellant was one of law for the Court, and not one of fact for the jury. *Curry* v. *Stevenson*, 58 App. D. C. 162. It certainly cannot be said that upon consideration of all the evidence in this case fair-minded men might honestly differ as to whether James Murphy was engaged in performing the duties of his employment when the accident took place. *Lucas* v. *Friedman*, 58 App. D. C. 5, 24 F.2d 271.

The evidence wholly failed to meet the test prescribed by the decisions above referred to, and it was the plain duty of the trial judge to have withdrawn the case from the jury, and directed a verdict insofar as the appellant was concerned.

II.

The rule of law that the admissions of an agent may never be used to prove the agency is generally recognized and settled. It is the law of this jurisdiction. *Peabody* v. *Marlboro Implement Co.*, 63 App. D. C. 288, 72 F.2d 81, certiorari denied, 293 U. S. 601, 55 S.Ct. 118, 79 L.Ed. 693; *Adams Express Co.* v. *Berry & Whitmore Co.*, 35 App. D. C. 208, 213.

It is also well settled that the declaration of an agent as to the scope of his employment or authority is inadmissible, as against his employer, even though the declaration was made as a part of the res gestae.

In 163 A. L. R. 198n, numerous cases are collected under the headnote reading as follows:

"By the weight of authority, the declaration of one alleged to have caused an accident that he was em-

ployed by the defendant, or that he was then engaged in some business for the defendant, is inadmissible, even though made under such conditions as would otherwise qualify it as a part of the res gestae."

The leading Federal case is *Dudley* v. *Preston Motor Company* (1931) 51 F.2d 8, where the Court said:

"Considering the evidence in its most favorable light for appellant, we conclude that it does not substantially show that at the time of the accident Roberts was engaged in any business for appellee or that appellee had either expressly or impliedly authorized him to use the automobile upon that occasion. We think that he was upon a trip entirely personal to himself, and that there is no substantial relevant evidence to the contrary, and the judgment therefore should be affirmed. See *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254, 45 S.Ct. 300, 69 L.Ed. 597; *American Oil Co.* v. *Frederici*, 47 F.2d 54, 57 C.C.A. 6.

"Appellant testified that at the time of the accident, and after his son had been taken out of the wrecked car, Roberts made the statement to him which he repeated the succeeding day in the presence of Preston and Kilpatrick as above indicated. This testimony was offered as a part of the res gestae, and its introduction was denied. We think there was no error in its denial. It threw no light upon the cause of the collision. The manifest purpose of appellant in the introduction of it was to use this declaration of Roberts as evidence of his agency for which purposes it was, of course, incompetent."

The authorities collected under 163 A.L.R. 198n, are supplemented by others to the same effect in A.L.R 2d 606.

The testimony of Mrs. Rita H. Ball that James Murphy stated to her at the scene of the accident that "he had to call on a customer" was manifestly offered for the purpose of proving agency in a case where by all of the other evidence none existed. The erroneous admission

of that declaration formed the only evidenciary basis for sending the case to the jury on the question of agency, and under the Court's charge, the verdict of the jury must have been based upon that evidence. If the Court had granted appellant's motion to strike and properly excluded the declaration, it would have been its duty to instruct a verdict for the appellant.

The Court below seems to have considered that the decision of this Court in the case of *Kas* v. *Gilkerson*, 91 U.S.App.D.C. 153, 199 F.2d 398, afforded some precedent for the admission of the declaration testified to by Mrs. Ball (R. 107; J. App. 83, 84). But the question here discussed was not involved in that case, either in the trial court, or on appeal. The trial court appears to have admitted testimony of a policeman to the effect that the truck driver, operating his employer's truck involved in a collision, stated at the scene of the accident that he had made a delivery for his employer. That evidence was apparently not objected to at the trial, and was not questioned or considered on appeal. The case turned on the point that the truck driver had gone off on a journey of his own when the accident occurred, and this Court, applying the law of Maryland, reversed the judgment on the ground that the agent had deviated from the scope of his employment, and held the employer not liable under those circumstances.

CONCLUSION

The Court erred in admitting into evidence the testimony as to declarations made at the scene after the accident, for the reason that said declarations were incompetent and inadmissible as proof that James B. Murphy was acting within the scope of his employment at the time of the accident; and the Court erred in submitting the case to the jury on the question of agency, under all the evidence; and that the Court further erred in over-

ruling the appellant's motion to set aside the verdict and for judgment non obstante veredicto; and, for the reasons urged herein, the action of the Court below should be reversed.

R. Sidney Johnson
Guy B. Hardy
Attorneys for Appellant,
Union Trust Building,
Washington 5, D. C.